TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 534.

JOHN M. WHEELER AND WILLIAM T. HOWES, PLAINTIFFS IN ERROR,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED FEBRUARY 21, 1900.

(17,648.)

(17,648.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 534.

JOHN M. WHEELER AND WILLIAM T. HOWES, PLAINTIFFS IN ERROR,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

INDEX

	Original.	Print.
Writ of error	*a*	1
Citation	*d*	2
Proof service of citation	*e*	2
Bond on writ of error	*f*	3
Assignment of errors	*j*	4
Petition for writ of error	*o*	6
Return to writ of error	*t*	8
Transcript from superior court	1	9
Application of N. Y., N. H. & H. R. R. Co.	1	9
Order on foregoing application	3	10
Exhibit A—Copy of agreement referred to in application	3	11
B—Map (not set out)	7	14
Part of Exhibit A—Proceedings of railroad commissioners	7*a*	14
Demurrer to amended application	8	18
Order overruling demurrer	10	19
Answer to amended application	10	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 19, 1900.

	Original	Print
Motion of applicant to strike out and order thereon	12	21
Judgment	12	21
Notice of appeal	13	22
Defendants' or respondents' draft for finding (omitted in printing)	14	—
Finding	18	22
Extracts from records of common council	21	24
Defendants' motion for correction of finding (omitted in printing)	31	—
Defendants' exceptions to findings and refusal to find (omitted in printing)	32	—
Exhibit 101—(Not set out) (omitted in printing)	33	—
102—(Not set out) " "	33	—
103—Testimony of W. D. Bishop, Jr. (omitted in printing)	33	—
Defendants' appeal	46	34
Judge's certificate	47	35
Clerk's certificate	47	35
Judgment	48	35
Opinion	51	36
Clerk's certificate	64	42

a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between John M. Wheeler and William T. Howes, plaintiffs in error, and The New York, New Haven & Hartford Railroad Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the
b Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of January, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

c [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *v.* The New York, New Haven and Hartford Railroad Company, defendant in error. Writ of error. Original.

d UNITED STATES OF AMERICA, *ss:*

To the New York, New Haven & Hartford Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein John M. Wheeler and William T. Howes are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 30th day of January, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

e [Endorsed:] Citation. Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Citation in error, original.

On this first day of February, in the year of our Lord one thousand nine hundred, personally appeared Wm. B. Boardman before me, the subscriber, a notary public for the State of Connecticut, and makes oath that he delivered a true copy of the within citation to William D. Bishop, Jr., as he is the secretary of The New York, New Haven and Hartford Railroad Company, the defendant in error, and that said Bishop is such secretary.

Sworn to and subscribed the first day of February, A. D. 1900.

[Seal of George P. Carroll, Notary Public, Bridgeport, Conn.]

GEORGE P. CARROLL,
Notary Public for the State of Connecticut.

BRIDGEPORT, CONN., *Feb. 1st*, 1900.

This is to certify that a copy of the within citation was served on me this day.

WM. D. BISHOP, JR.,
Secretary of the New York, New Haven & Hartford Railroad Company.

DISTRICT OF CONNECTICUT:

BRIDGEPORT, CONNECTICUT, *Feb. 6th*, 1900.

I certify that I served the within citation by leaving a true & attested copy in the hands of William D. Bishop, Jr., as he is the secretary of the within-named The N. Y., N. H. & H. R. R. Co.

Attest: EDSON S. BISHOP,
U. S. Marshal,
By JOHN H. CLARKE, *Deputy.*

Fees.

Travel, 20 miles @ 6	1.20
Service	2.00
Endorsem't	.12
	$3.42

f Know all men by these presents that we, John M Wheeler and William T. Howes, both of Bridgeport, Conn., as principals, and Allan W. Paige, of said Bridgeport, as surety, are held and firmly bound unto the New York, New Haven and Hartford Railroad Company in the full and just sum of five hundred dollars, to be paid to the said obligee, The New York, New Haven and Hartford Railroad Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of January, in the year of our Lord one thousand and nine hundred.

Whereas lately, at a session of the supreme court of errors of the State of Connecticut, in a suit depending in said court between The New York, New Haven and Hartford Railroad Company, the obligee, defendant in error, and John M. Wheeler and William T. Howes, the principals of this bond, obligors, plaintiffs in error, a judgment was rendered against the said plaintiffs in error, and the said plaintiffs in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said defendant in error, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said plaintiffs in error shall prosecute said writ of error to effect
g and answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN M. WHEELER. [SEAL.]
WM. T. HOWES. [SEAL.]
ALLAN W. PAIGE. [SEAL.]

Sealed and delivered in presence of—
CARRIE B. WILSON.

STATE OF CONNECTICUT, }
Fairfield County, Bridgeport. }

Personally appeared the above-named Carrie B. Wilson, who, being duly sworn, deposes and says that she saw the within-named John M. Wheeler and William T. Howes and Allan W. Paige sign, seal, and, as their free act and deed, deliver the within-written bond.

CARRIE B. WILSON.

Subscribed and sworn to before me this 12th day of January, 1900.

[NOTARIAL SEAL.] GEORGE P. CARROLL,
Notary Public.

h STATE OF CONNECTICUT, } *ss:*
Fairfield County, Bridgeport, }

Personally appeared the above-named John M. Wheeler, William T. Howes, and Allan W. Paige, who, being duly sworn, severally deposes and says, each of and for himself, that he is worth the sum of five hundred dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

JOHN M. WHEELER.
WM. T. HOWES.
ALLAN W. PAIGE.

Subscribed and sworn to before me this 12th day of January, 1900.

[NOTARIAL SEAL.] GEORGE P. CARROLL,
Notary Public.

Approved by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

January 30th, 1900.

i [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Bond. Copy.

j JOHN M. WHEELER and WILLIAM T. HOWES, Plaintiffs in Error, *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant in Error. } Assignment of Errors and Prayer for Reversal.

The plaintiffs in error make the following assignment of errors which they aver occurred in the final judgment of the supreme court of errors of the State of Connecticut, at its October term, A. D. 1899, on or about the second day of January, A. D. 1900, herein: That error was committed in deciding against the right specially set up and claimed by the plaintiffs in error under section 1 of

article fourteen of the articles in addition to and amendment of the Constitution of the United States of America and under the provisions thereof, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and in so deciding against said right said supreme court of errors decided adversely as follows:

I. In overruling the claims of the plaintiffs in error raised by their demurrer to a certain amended application, dated May 5, 1899, and brought by the defendant in error to the Honorable Ralph Wheeler, a judge of the superior court of the State of Connecticut, in which application the defendant in error requested said judge to appoint appraisers to estimate such damages as
k should arise from the taking and occupation of certain real estate described in said application and belonging to the plaintiffs in error, in which demurrer a reason of demurrer therein set forth was as follows:

In view of the fact that the agreement and plans, annexed to said application by amendment, and the vote of the board of directors of said The New York, New Haven and Hartford Railroad Company provide that in substitution of the present two main tracks of the company which pass through the city of Bridgeport, and which cross twenty one or more highways at grade, said company shall construct through said city an elevated structure crossing said highways above grade and wide enough to accommodate four main railroad tracks and nearly twice as wide as would be necessary to accommodate said two tracks if so elevated; shall acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; shall erect a part of said structure on said land so to be acquired; shall connect two parts of said land so to be acquired by means of a new drawbridge wide enough to accommodate four main railroad tracks, and shall construct alongside a part of said structure and in part on said land so to be acquired a fifth or spur track at grade with quite a number of said highways which will continue to be crossed at grade by said fifth track; and in view of the fact that by said agreement it is further provided that said city shall pay to said company one-sixth of the entire cost of all of such work of construction and of the expense of the land so to be acquired, and also of certain land already acquired for the purpose of said four-track construction, and also
l of all damages to property resulting from changes of grade of said company's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars (all of which appears as a matter of law from an inspection of the application as amended)—in view of these facts, if said payments shall be made by said city, they will be a reimbursement to said company for expenses to be incurred by it in doing work and in acquiring land not necessary or germane to the work of eliminating crossings at grade of said two

present main tracks over said highways, and under these circumstances the taking and condemnation of said Wheeler & Howes' property described in the application will be in furtherance of and as part and parcel of a scheme whereby the city of Bridgeport will contribute and make donation to said company of the credit, money, and property of said city and of its property owners and tax-payers in aid of said railroad company, contrary to the provisions of the twenty-fifth amendment to the constitution of the State of Connecticut and the taking and condemnation of said Wheeler & Howes' said property will be a taking thereof without due process of law and contrary to the provisions of section 1 of article XIV of the amendments to the Constitution of the United States.

II. In overruling the same claims of law made by the plaintiffs in error, and made in view of the same state of facts upon the issue of fact raised by their first defense to said application.

m III. In entering up judgment appointing appraisers as requested in said application.

And the plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment.

ROBERT E. DE FOREST,
Attorney for Plaintiffs in Error.

January 12th, 1900.

n [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Assignment of errors and prayer for reversal. Copy. Robert E. De Forest, attorney for plaintiffs in error, Bridgeport, Conn.

o

JOHN M. WHEELER and WILLIAM T. HOWES, Plaintiffs in Error,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD Railroad Company, Defendant in Error.
} Petition for Writ of Error.

To the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States:

The petition of the above-named plaintiffs in error showeth that at the October term, A. D. 1899, on or about the second day of January, A. D. 1900, the supreme court of errors of the State of Connecticut, the highest court of that State in which a decision could be had, entered a final judgment herein in favor of the defendant in error, The New York, New Haven and Hartford Railroad Company, and against the plaintiffs in error, in which certain judgment certain errors were committed to the prejudice of the plaintiffs in error, among which are these, to wit, in deciding against the right

specially set up and claimed by the plaintiffs in error under section 1 of article fourteen of the articles in addition to and amendment of the Constitution of the United States of America and under the provisions thereof, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and in so deciding against said right said supreme court of errors decided adversely as follows:

p I. In overruling the claims of the plaintiffs in error raised by their demurrer to a certain amended application dated May 5, 1899, and brought by the defendant in error to the Honorable Ralph Wheeler, a judge of the superior court of the State of Connecticut, in which application the defendant in error requested said judge to appoint appraisers to estimate such damages as should arise from the taking and occupation of certain real estate described in said application and belonging to the plaintiffs in error, in which demurrer a reason of demurrer therein set forth was as follows:

In view of the fact that the agreement and plans, annexed to said application by amendment, and the vote of the board of directors of said The New York, New Haven and Hartford Railroad Company provide that, in substitution of the present two main tracks of the company, which pass through the city of Bridgeport and which cross twenty-one or more highways at grade, said company shall construct through said city an elevated structure crossing said highways above grade and wide enough to accommodate four main railroad tracks, and nearly twice as wide as would be necessary to accommodate said two tracks if so elevated; shall acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; shall erect a part of said structure on said land so to be acquired; shall connect two parts of said land so to be acquired by means of a new drawbridge wide enough to accommodate four main railroad tracks, and shall construct

q alongside a part of said structure and in part on said land so to be acquired a fifth or spur track at grade with quite a number of said highways, which will continue to be crossed at grade by said fifth track; and in view of the fact that by said agreement it is further provided that said city shall pay to said company one-sixth of the entire cost of all of such work of construction and of the expense of the land so to be acquired, and also of certain land already acquired for the purpose of said four-track construction, and also of all damages to property resulting from changes of grade of said company's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars (all of which appears as a matter of law from an inspection of the application as amended)—in view of these facts, if said payments shall be made by said city, they will be a reimbursement to said company for expenses to be incurred by it in doing work and in acquiring land not necessary or germane to the work of eliminating crossings at grade of said two present main

tracks over said highways, and under these circumstances the taking and condemnation of said Wheeler & Howes' property described in the application will be in furtherance of and as part and parcel of a scheme whereby the city of Bridgeport will contribute and make donation to said company of the credit, money, and property of said city and of its property-owners and tax payers in aid of said railroad company, contrary to the provisions of the twenty-fifth amendment to the constitution of the State of Connecticut,
r and the taking and condemnation of said Wheeler & Howes' said property will be a taking thereof without due process of law and contrary to the provisions of section 1 of article XIV of the amendments to the Constitution of the United States.

II. In overruling the same claims of law made by the plaintiffs in error and made in view of the same state of facts upon the issue of fact raised by their first defense to said application.

III. In entering up judgment appointing appraisers, as requested in said application.

Wherefore the plaintiffs in error pray that a writ of error may issue in their behalf to the supreme court of errors of the State of Connecticut for the correction of errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT E. DE FOREST,
Attorney for Plaintiffs in Error.

January 12th, 1900.

s [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Petition for writ of error. Copy. Robert E. De Forest, attorney for plaintiffs in error, Bridgeport, Conn.

t To all persons to whom these presents shall come, Greeting:

In pursuance of the command of the writ of error, within, I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut for the third judicial district, herewith transmit a true copy of the record and all proceedings in the case of The New York, New Haven and Hartford Railroad Company against John M. Wheeler and William T. Howes, lately pending in the supreme court of errors of the State of Connecticut for the third judicial district, in the words and figures following, to wit:

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said State of Connecticut, this 20th day of February, 1900.

WM. R. SHELTON, *Clerk.*

1 Supreme Court of Errors, Third Judicial District, October Term, 1899.

N. Y., N. H. & H. R. R. Co. }
vs. }
Wheeler & Howes. }

Defendant's Appeal.

To the Honorable R. Wheeler, a judge of the superior court:

The application of the New York, New Haven and Hartford Railroad Company, a railroad corporation under the laws of this State, respectfully represents:

1. On December 21, 1895, said railroad company and the city of Bridgeport, under the provisions of and by authority of a special act of the General Assembly of the State of Connecticut, passed at its January session, 1895, and entitled An act "providing for the abolition of grade crossings in Bridgeport," duly executed a certain agreement.

2. On December 21, 1895, said railroad company and said city, pursuant to the provisions of said special act, brought their application to the railroad commissioners of this State for their approval of said agreement.

3. On January 23, 1896, said railroad commissioners, after due notice and hearing, made their order and finding approving said agreement and each and every of its provisions, and the same thereby became and ever since has been and still is an order of said railroad commissioners, as to all matters therein contained or referred to.

4. A copy of said agreement and of the plans therein referred to and made a part thereof, and of said order and finding of said
2 railroad commissioners approving the same *are* on file in the offices of the town clerk and of the city clerk in said city of Bridgeport, reference to which is hereby had, and the same *are* made a part of this application, and marked Exhibits A and B.

5. In order properly to carry out in any and all particulars, as called for in said plans, the work imposed upon said railroad company by said special act and agreement and said order and finding of said railroad commissioners, said company deemed it necessary to take all those certain pieces or parcels of land as shown on said plans, and on July 11, 1896, the board of directors of said company passed the following resolution, viz:

"Resolved, That this company, with the approval of the railroad commissioners, so far alters the location of its road in the city of Bridgeport, as to change the radius of its curves, straighten and improve its lines, width and extent of depot grounds, slopes and embankments, and extend its lines of sight, and for said purposes, and for additional tracks, turnouts, freight and passenger stations and depots, hereby takes all those certain pieces or parcels of land as shown on plans referred to in a certain agreement between this company and said city, dated the 21st day of December, 1895,"

(and thereby took said land subject to the approval thereof by said railroad commissioners).

6. The following-described land constitutes one of said certain pieces or parcels of land shown on said plans referred to in said agreement, to wit: All that certain lot or parcel of land situate in said Bridgeport, bounded, northerly on Sterling street, seventy-nine and one-half (79½) feet; easterly on land of Wheeler & Howes, two hundred and seventy-three (273) feet; southerly on Bridgeport harbor, seventy-nine and two-tenths (79.2) feet; and westerly on land of said Wheeler & Howes, two hundred and five and eight-tenths (205.8) feet.

7. John M. Wheeler and William T. Howes, both of said Bridgeport, partners in business, under the firm name of Wheeler & Howes, are and for more than five years last past have been the owners of the above-described land.

8. On June 30, 1897, the railroad commissioners of this State, after due notice to said Wheeler & Howes, and after due hearing had, made their order and finding approving the taking by said railroad company of the above-described land.

9. The applicant railroad company, though it has endeavored so to do, cannot obtain said land described in paragraph 6 hereof by agreement with the said Wheeler & Howes.

3 Wherefore your applicant respectfully requests your honor to appoint appraisers to estimate all damages that may arise to the above mentioned Wheeler & Howes, from the taking and occupation of said real estate for the purposes hereinbefore set forth in the same manner as is now provided by statute for taking land for railroad purposes.

Dated at Bridgeport, this 5th day of May, 1899.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.,
By STODDARD & BISHOP, *Its Attorneys.*

Ordered: That the foregoing application be heard before me in the superior court room at the court-house in Bridgeport, on the 10th day of May, 1899, at 10 o'clock in the forenoon, and that notice thereof be given to the said John M. Wheeler and William T. Howes, by some proper officer or indifferent person, by leaving with or at the usual place of abode of the said Wheeler & Howes, on or before the 6th day of May, 1899, a true and attested copy of said application and of this order.

Dated at Bridgeport, Conn., the 5th day of May, 1899.

RALPH WHEELER,
A Judge of the Superior Court.

EXHIBIT A.

N. Y., N. H. & H. R. R. Co. vs. WHEELER & HOWES. } Application for Appointment of Appraisers. Before Hon. Ralph Wheeler, May 5, 1899.

Copy of Agreement Referred to in the Foregoing Application.

Whereas, the General Assembly of the State of Connecticut at its last session, passed a resolution which was approved June 22, 1895, and which provides that, in order that the safety of the public may be insured, all crossings at grade over the main tracks of the railroad of the New York, New Haven & Hartford Railroad Company in the city of Bridgeport, shall be abolished, and also that said city and said railroad company may, within six months after the
4 passage of said resolution, agree upon the manner, plans, method and time in which said crossings at grade shall be abolished, and upon all other matters mentioned in section 5 of said resolution, and what amount or what proportion or what items of the cost thereof shall be paid by the city of Bridgeport, and for the purpose of making said agreement, empowered the mayor of said city of Bridgeport and William E. Seeley and Frederick S. Stevens, to act for said city.

Now, therefore, in accordance with the provisions of said resolution of the General Assembly, and subject to the approval of the board of railroad commissioners, the said city of Bridgeport, acting herein by its agents, Hon. Frank E. Clark, its mayor, and the said William E. Seeley, and Frederick S. Stevens, thereunto duly authorized by said resolution, and said New York, New Haven & Hartford Railroad Company, acting herein by John M. Hall, its vice-president, hereunto duly authorized, do hereby agree as follows:

1. For the purpose of abolishing the crossings aforesaid, the location, grade and plan of said railroad through said city and the number of its tracks, shall be substantially as shown upon the plans marked "Plans for the abolition of grade crossings on main line, N. Y., N. H. & H. R. R., city of Bridgeport, Conn.," said plans being signed by the respective agents of the parties hereto, and the work of excavation, construction, alteration and grading of said tracks, streets, approaches, bridges, and abutments, according to said plans, shall be done by said railroad company, both upon its own lands and upon the highways affected by said plans, except as hereinafter specifically otherwise provided. The grades of the railroad tracks and of the highways shall be as shown upon said plans. The stone abutments of all bridges shall be of equal workmanship to the abutments of the existing bridge across Fairfield avenue (west) unless modified by the railroad commissioners. Said railroad company, during the progress of said work, shall have the free use of such streets or portions of streets, and the right to temporarily close such streets as may be necessary for the convenient prosecution of the

work. Crescent avenue and Railroad street are hereby extended from their present easterly termini to the westerly line of the proposed freight station yard of said railroad company east of Central avenue; and East Washington avenue shall be extended and constructed by said city to Seaview avenue, provided said railroad company elects to lay a siding on the north side of its main tracks as hereinafter provided, and so much of South Railroad avenue between Broad and Main streets as is occupied by the structure of said railroad company, as shown on said plan, is hereby discontinued as a highway; and Clark, Wilmot and North and South Railroad avenues, west of Fairfield avenue (west), and all streets and private ways, whether existing or projected upon or across the property of said railroad company along its main-line tracks, not shown upon said plans, are hereby discon-ued, except the private ways between a point opposite the east end of Union street and Fairfield avenue (east). South Railroad avenue is hereby extended from Wordin avenue to Howard avenue forty feet wide. Said railroad company shall lay and maintain a track at grade upon the south side of South Railroad avenue from Fairfield avenue eastward to the westerly line of South avenue, free from all burdens or assessments of any kind, so long as said railroad company maintains the same; said track to be connected by proper switches with such side or spur tracks as now exist or as may be hereafter granted or permitted by said city. Said railroad companies shall bridge, as shown upon the plans, the following-named streets: Bostwick avenue, Hancock avenue, Howard avenue, Wordin avenue, Iranistan avenue, South avenue, Park avenue, Myrtle avenue, Warren street, Lafayette street, Broad street, Main street, Wall street, Fairfield avenue, Sterling street, Noble avenue, Clarence street, Kossuth street, East Main street, Pembroke street, Hallett street, Seaview avenue, Central avenue, and Bishop avenue, with the headroom in each case of not less than twelve feet in the clear between the crown of the street and the bottom of the girder, unless otherwise shown on the plans.

The location of the pipes, wires, poles or tracks of any water, gas, telephone, electric light, telegraph or power company, or street railway company, and all public or private sewers or drain pipes, shall be changed at the expense of said several companies, whenever in any manner they interfere with the prosecution of said work, or the construction or maintenance of the same, according to said plans, in such manner or in such time as the board of railroad commissioners shall order.

For the accommodation of the manufacturing and other shippers in East Bridgeport, said railroad company shall construct a fifth track leading from its proposed freight station in East Bridgeport, or from some point between said freight station and Seaview avenue to the easterly line of Hallett street and the same may be placed either on the north or south side of the main tracks, but shall cross Seaview avenue on a level with said main tracks. Such fifth track shall be considered as a part of the work herein provided for, and shall be included in the cost thereof, and said railroad company shall

have the right to use such portion of any street or streets im-
6 mediately adjoining the railroad location as may be neces-
sary for the location and maintenance of such fifth track, and said company shall be free from all burdens and assessments on account of said fifth track so long as it shall maintain the same.

2. It is understood and agreed that the work herein provided for shall commence on or before the first day of April, 1896, and proceed as rapidly as practicable until finished.

3. In consideration whereof said city hereby agrees to pay to said railroad company one-sixth of the entire cost of constructing a four-track railroad from Fairfield avenue (west) to Bruce's Brook, as by the alignment and grade shown on the plans above named, including the work done in the highways as per said plans, and including all bridges ready for ties, and all damages to property resulting from the change of grade of said railroad or street or ways, or the discontinuance of the same or parts thereof, and the cost of and damages to all lands which have been or may be acquired by said railroad company for the purposes of said four-track construction, together with a reasonable allowance for the services and expenses to the date hereof of Frank E. Clark, William E. Seeley and Frederick S. Stevens, the persons appointed by said resolution to act for said city, and for such service as is imposed upon them by the provisions of this agreement; provided that the total cost to be paid by the said city shall not exceed in the aggregate the sum of four hundred thousand dollars ($400,000).

Said railroad company shall keep a detailed account of the cost of such construction, excluding therefrom the cost of the passenger station and grounds, and the approaches thereto, not required for said four-track construction, and all switches or side tracks, and all other items properly belonging to the superstructure of said railroad. In case any question shall arise between said city and said railroad company as to any items charged or claimed as a proper charge for the construction account, either by said railroad company or said city, and the said city and said railroad company cannot agree as to its allowance as a proper charge to said construction account, all such disputed items shall be left to the arbitrament of the board of railroad commissioners of the State of Connecticut, whose decision shall be final and conclusive in the matter. In case any question shall arise between said railroad company and said city as to the value of any land owned or acquired by the railroad company, or damages thereto on account of the necessary use thereof or damage thereto by the construction of said four-track railroad, and said city and said railroad company shall be unable to agree as to the value or amount thereof,
then the equitable value of the portion of such property
7 used, occupied or damaged, shall be determined by the Hon. Frank E. Clark, William E. Seeley, Frederick S. Stevens, Wm. D. Bishop, I. De Ver Warner, and James Staples, or by a majority of them, under oath, and their decision shall be final and conclusive between the parties, as to the amount properly chargeable to the cost of the work herein provided for. The amounts

paid for all items of construction, land damages, by reason of changes of grades, discontinuance of streets or parts thereof, and all damages of every kind paid on account thereof for the prosecution of said four-track construction, shall be submitted to Frank E. Clark, William E. Seeley and Frederick S. Stevens, as a committee to audit the same in behalf of said city, and shall be verified, if required, by said committee. If said committee, at any time shall neglect or refuse to audit or approve said accounts, when requested so to do, the board of railroad commissioners shall, upon the request of either party, audit such accounts, and when so audited and approved by either said committee or said railroad commissioners, as above provided, the amount thereof shall be accepted by both parties as a part of the entire cost of construction. It is further agreed that said accounts shall be audited as often as once in thirty days, if required by the railroad company, and when so audited the proportion to be paid by the city to said railroad company shall be a debt due said railroad company, and shall draw interest at the rate of five per cent. per annum until paid.

In witness whereof, the parties hereto have hereunto subscribed their corporate names, acting herein by their respective agents hereunto duly authorized, this twenty-first day of December, A. D. 1895.

CITY OF BRIDGEPORT,
By FRANK E. CLARK, *Mayor.*
WM. E. SEELEY.
FREDERICK S. STEVENS.
THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By JOHN M. HALL, *Vice-President.*
THE APPELLANT,
By STODDARD & BISHOP, *Their Attorneys.*

(Filed May 15, 1899, at 3 p. m.
R. WHEELER.)

EXHIBIT B.

(Map on file, not printed.)

7a PART OF EXHIBIT "A," to be Inserted on Page 7 of Record, before the Words—

"(Filed May 15, 1899, at 3 p. m. R. Wheeler.)"

STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *January* 23, 1896.

Be it remembered, that the City of Bridgeport and the New York, New Haven & Hartford Railroad Company presented their petition to us, dated December 21, 1895, as follows, viz:

NEW HAVEN, *December* 21, 1895.

To the honorable board of railroad commissioners of the State of Connecticut.

GENTLEMEN: We herewith submit to your honorable board for approval an agreement duly executed by the City of Bridgeport and the New York, New Haven & Hartford Railroad Company, together with the plans referred to in said agreement, under the provisions of section 2 of the resolution of the last General Assembly, providing for the abolition of the grade crossings in the city of Bridgeport.

We respectfully request your approval of the same, and such action in the matter as is provided by said resolution of the General Assembly.

Yours respectfully,

CITY OF BRIDGEPORT,
By FRANK E. CLARK, *Mayor.*
WM. E. SEELEY.
FREDERICK S. STEVENS.
THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By JOHN M. HALL, *Vice-President.*

Upon which petition the following order of notice for hearing was by us made on the 3d day of January, 1896, viz:

STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *January* 3, 1896.

Upon the foregoing application it is ordered that the matter of the approval of said agreement be heard at the common
7*b* council chamber in said Bridgeport, on Wednesday, the 15th of January, 1896, at 12 o'clock noon, and that notice thereof be given to all persons interested to appear and be heard thereon, by publishing a copy of said application and of this order in the Standard, the Farmer, the Post and the Union, newspapers published in said Bridgeport, for at least one week preceding said day of hearing.

GEO. M. WOODRUFF,
WM. O. SEYMOUR,
ALEX. C. ROBERTSON,
Railroad Commissioners.

And on said 15th day of January, we met at the time and place named in said order of notice, when it appeared, and we do find that said order had been complied with, and reasonable notice of the time and place of hearing given to the parties interested, and said City of Bridgeport and said New York, New Haven and Hartford Railroad Company appeared to prosecute their said petition, and F. J. Mooney and others, by their attorneys, De Forest & Klein, also appeared and filed their protest, as follows, viz:

BRIDGEPORT, CONN., *January* 15, 1896.

To the hon. the railroad commissioners of the State of Connecticut.

GENTLEMEN: A notice having been published that your board will hold a session in Bridgeport, on Wednesday, the 15th day of January, to hear all parties in interest upon an application made to you for your approval of a certain pretended contract between the City of Bridgeport, and the New York, New Haven & Hartford Railroad Company relative to grade crossings and other matters, in behalf of certain property-owners, citizens and tax-payers of said city, we respectfully protest against any such action upon your part for the reason that said pretended contract is in no respect authorized or approved by said city, and that said city has no power to make, approve, authorize or enter into such a contract, or to submit the same to you for approval, and that the use of the name of said city in said application is entirely without the authority or approval of said city, and that the persons assuming to act for said city in the matter of said contract have and had no authority so to do.

We call your attention to the fact that the said city has never applied through its common council or otherwise to you for the abolition of said grade crossings, but on the contrary, has
7c distinctly declined so to do, and the obligation to eliminate them at their own expense rests solely upon said railroad company under the general law of the State; that the said work, together with the elevation of the tracks of said company at other points in said city, the addition of two tracks to those already used by said company, and all the other changes and improvements contemplated in said pretended contract, are strictly in the interest and a part of the business of said railroad company, and that no part of the expense of the same can be lawfully assumed by, or imposed upon said city; that any attempt to do so is in violation of the rights of said city and its tax-payers, and in conflict with the express provisions of the constitution of our State, and that, therefore, the said pretended contract, and the pretended statute under which said contract purports to be made, and all proceedings which have been attempted or taken, or which may hereafter be attempted under the same, are unconstitutional, illegal, void, and in fraud of the tax-payers of said city.

DE FOREST & KLEIN,
Attorneys for F. J. Mooney and Others.

Which protest was by us overruled, disallowed and dismissed; and no one else appearing to oppose the petition, we, on consideration, did find that all the crossings at grade over the main tracks of said railroad company in the city of Bridgeport are dangerous to the public travel; that public safety requires alterations in said crossings; that, in order that the safety of the public may be insured, all said crossings at grade should be abolished; that the manner, plans, methods, and time in which the said crossings at grade shall be abolished, and all other matters mentioned in section 6 of the resolution of the General Assembly of this State, "provid-

ing for the abolition of grade crossings in Bridgeport," approved June 22, 1895, as stipulated in said agreement, will accomplish the object of said resolution and fulfill all the requirements of public convenience and necessity; that the apportionment of the cost between the city and the railroad company, and the methods for ascertaining the amount of the cost thereof to be paid by said city, as stipulated in said agreement, are in all respects reasonable and equitable as between the parties, and that said agreement is in accordance with, and within the provisions of, the said resolution of the General Assembly.

Wherefore, the undersigned board of railroad commissioners, acting under the authority of said resolution, hereby approve said agreement, and each and every of its provisions.

7*d* And we do hereby determine and order that said agreement be executed according to its terms, and that the changes in the manner in which the tracks of said railroad shall be carried through said city shall be made as shown upon said plans and stipulated in said agreement; that the highways and private ways shall be carried across said railroad, that the highway and private ways and parts thereof shall be discontinued and closed, and that new highways shall be laid out, all as shown on said plans and stipulated in said agreement; and we do hereby determine that the time within which and the manner in which said changes shall be made, shall be in accordance with the stipulations in said agreement, and we do hereby require said railroad company to make such changes in the grade, alignment, radii of curves, and location of the tracks of said company, and to make such changes in the grades, lines and width of streets and highways as shown on said plans and stipulated in said agreement; and we do authorize and require said railroad company to construct a new drawbridge across the navigable waters of Bridgeport harbor, and determine the place where the draw in said bridge shall be constructed, as shown on said plans and as stipulated in said agreement; and we deem necessary and proper for the due execution of the purposes of said resolution, and do order that streets in said city be temporarily used, occupied and closed as stipulated in said agreement, and that the number of tracks to be constructed by said railroad company shall be as shown on said plans and stipulated in said agreement; and we do direct that said railroad company shall do all the work of excavation, construction, alteration and grading of said tracks, streets, approaches, bridges and abutments required in doing said work, according to said plans and as stipulated in said agreement.

And as to any matters requiring our further order in the premises we will hear and determine the same from time to time upon the application of either party to said agreement.

GEO. M. WOODRUFF,
WM. O. SEYMOUR,
ALEX. C. ROBERTSON,
Railroad Commissioners.

8 THE N. Y., N. H. & H. R. R. Co. } Before Hon. Ralph Wheeler,
vs. } a Judge of the Superior
WHEELER & HOWES. } Court, May 15, 1899.

Demurrer to Amended Application.

The defendants demur to the application, in the above matter, amended, pursuant to the order of his honor this day made, by annexing to the application as a constituent part thereof, a copy of the agreement referred to in said application and a copy of the plans referred to in said agreement; and for reasons of said demurrer they assign the following:

1. Because no facts appear showing that the applicant has or has ever had the right to take the real estate of the defendants therein referred to, for railroad purposes or for any purpose.

2. Because said agreement and plans and the vote of the applicant's board of directors provide that, in substitution of the present two main tracks of the applicant, which pass through the city of Bridgeport, and which cross twenty-one or more highways at grade, the applicant shall construct through said city an elevated structure crossing said highways above grade and wide enough to accommodate four main railroad tracks, and nearly twice as wide as would be necessary to accommodate said two tracks if so elevated; shall acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; shall erect a part of said structure on said land so to be acquired; shall connect two parts of said land so to be acquired by means of a new draw-bridge wide enough to accommodate four main railroad tracks; and shall construct alongside a part of said structure and in part on said land so to be acquired, a fifth or spur track at grade with quite a number of said highways which will continue to be crossed at grade by said fifth track. By said agreement it is further provided that said city shall pay to the applicant one-sixth of the entire cost of all of such work of construction and of the expense of land so to be acquired and also of certain land already acquired for the purpose of said four-track construction and also of all damages to property resulting from changes of grade of the applicant's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars. If said payments shall be made by said city, they will be a reimbursement to the applicant for expenses to be incurred by it in doing work and in ac-
9 quiring land not necessary or germane to the work of eliminating the crossings at grade of said two present main tracks over said highways. Under the circumstances, as above set forth, the taking and condemnation of the defendants' property, as described in the application, will be for purposes not authorized by the special act of 1895, p. 416, and will be contrary to the provisions of the twenty-fifth amendment to the constitution of this State and of section 1 of article XIV of the amendments to the Constitution of the United States.

3. Because it appears that said pretended contract was not other

wise executed on the part of said city than by the said individuals—Clark, Stevens and Seeley, assuming to attach the name of said city thereto, and because it does not appear that said city ever authorized said individuals to act in its behalf in executing or in any manner making said pretended contract.

4. Because it does not appear from said application or from said contract or specification that said pretended contract is within the authority of and in accordance with said special act of the legislature.

5. Because it appears from the details of said contract that it is not within the authority of or in compliance with said special act of the legislature.

6. Because it appears from the provisions of said special act of the legislature that said act is unconstitutional as contravening the twenty-fifth amendment of the constitution of this State and section 1 of article XIV of amendment of the Constitution of the United States.

7. Because it appears that the pretended doings of said railroad commissioners were founded upon said special act of the legislature and because it does not appear by the provisions of said act said railroad commissioners ever had any jurisdiction or authority to act in the premises.

8. Because it appears by the said vote of the applicant's board of directors that the land of the defendant is not desired or needed for the purposes specified in said special act of the legislature, but for the purposes set forth in said vote; and that the city of Bridgeport will be called upon to reimburse the applicant for the taking of said property for the purposes specified in said vote and not for the purpose of eliminating grade crossings.

THE DEFENDANTS,
By DE FOREST & KLEIN AND
PAIGE & CARROLL,
Their Attorneys.

(Filed May 15, 1899, at 3 p. m.)

10 Demurrer overruled on the ground that each and every reason therein stated is insufficient.

R. WHEELER, *J.*

May 15, 1899.

Exception taken to the overruling of demurrer.

R. WHEELER, *J.*

THE N. Y., N. H. & H. R. R. Co. *vs.* WHEELER & HOWES. } Before Hon. Ralph Wheeler, a Judge of the Superior Court, May 15, 1899.

Answer to Amended Application.

First defense.

1. As to par. 1, it is admitted that said agreement there referred to, and now by amendment made a part of the application, was

signed by the Messrs. Clark, Seeley and Stevens, named in the special act, but the defendants allege that said city of Bridgeport never authorized said persons to act for it in regard to said agreement, or in regard to any agreement with the applicant in relation to the matters referred to in said agreement.

2. As to par. 2, it is denied that said city then, or at any time, brought any such application as is there alleged, unless the same be implied in law from the fact, which is admitted, that said three persons, claiming and purporting to act for said city, brought such an application.

3. Par. 3 is admitted as far as and including the word "provisions" in the third line thereof. The rest of said paragraph is denied.

4. Par. 4 is admitted.

5. Par. 5 is admitted so far as it alleges that said board of directors passed said vote. The rest of said paragraph is denied.

6. Par. 6 is admitted.

7. Par. 7 is admitted.

8. Par. 8 is admitted.

9. Par. 9 is denied.

11 Second defense.

1. The agreement, and the plans made a part thereof, referred to in the application, and the vote of the applicant's board of directors provided that, in substitution of the present two main tracks of the applicant, which pass through the city of Bridgeport, and which cross twenty-one or more highways at grade, the applicant should construct through said city an elevated structure crossing said highways above grade, and wide enough to accommodate four main railroad tracks, and nearly twice as wide as would be necessary to accom-odate said two tracks if so elevated; should acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; should erect a part of said structure on said land so to be acquired; should connect two parts of said land so to be acquired by means of a new drawbridge wide enough to accommodate four main railroad tracks; and should construct alongside a part of said structure and in part on said land so to be acquired, a fifth or spur track at grade with quite a number of said highways which will continue to be crossed at grade by said fifth track.

2. By said agreement it was further provided that the said city should pay to the applicant one-sixth of the entire cost of all of such work of construction and of the expense of land so to be acquired and also of certain land already acquired for the purpose of said four-track construction, and also of all damages to property resulting from changes of grade of the applicant's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars.

3. If said payments shall be made by said city, they will be a reimbursement to the applicant for expense to be incurred by it in doing work and in acquiring land not necessary or germane to the

work of eliminating the crossings at grade of said two present main tracks over said highways.

THE DEFENDANTS,
By DE FOREST & KLEIN AND
PAIGE & CARROLL,
Their Attorneys.

Filed May 15, 1899, at 5 o'clock p. m.
R. WHEELER, *J.*

May 15, 1899.

12 NEW YORK, NEW HAVEN & Hartford R. R. Company *vs.* WHEELER & HOWES. | Before Hon. Ralph Wheeler, Judge of the Superior Court, May 15, 1899.

Motion of Applicant to Strike Out Second Defense of the Answer to the Amended Application.

The applicant moves that the second defense be stricken out on the following grounds:

1st. The allegations therein have already been adjudged by this tribunal improper as an answer to this application, and have been stricken out.

2nd. The same are irrelevant and impertinent.

3rd. The allegations contained in said defence disclose no reasonable ground of defence to the application.

THE NEW YORK, NEW HAVEN &
HARTFORD RAILROAD CO.,
By STODDARD & BISHOP, *Its Attorneys.*

(Filed May 17th, 1899.
R. WHEELER, *J.*)

Motion granted on the grounds stated in 2d and 3d paragraphs. May 17, 1899.—Exception noted.

R. WHEELER, *J.*

In the Matter of the Application of THE N. Y., N. H. & H. R. R Co. *vs.* JOHN M. WHEELER and WILLIAM T. Howes, Both of Bridgeport. | Before Ralph Wheeler, Judge of the Superior Court, Fairfield County, May 25th, 1899.

Judgment.

In the matter of the foregoing application of the New York, New Haven & Hartford Railroad Company, it is found that reasonable notice thereof has been given to all parties in interest, to wit: John M. Wheeler and William T. Howes, in accordance with the
13–17 order of notice by me heretofore made, and by due continuance, the cause comes to this day; and now after due hearing had at the time and place stated in said order of notice and

at other times by legal continuance, the demurrer of the defendants to the application, amended by the filing of Exhibits A and B, having been overruled, and the motion of the plaintiff, filed May 17th, 1899, to strike out the second defense of the answer to the amended application, having been granted for the second and third reasons stated in said motion, I find the issues of fact raised by the first defense to the amended application in favor of the plaintiff, and all the allegations contained in said amended application true. Whereupon I appoint Edward B Bennett and Lewis Sperry, both of the city and county of Hartford and R. Jay Walsh of the town of Greenwich in Fairfield county, appraisers to estimate all damages that may arise to said Wheeler and Howes from the taking and occupation of the land described in said application for the purposes therein set forth, in the same manner as is now provided by statute for taking land for railroad purposes.

RALPH WHEELER,
Judge of the Superior Court.

THE NEW YORK, NEW HAVEN & Hartford Railroad Company *vs.* JOHN M. WHEELER and William T. Howes.	Before the Hon. Ralph Wheeler, a Judge of the Superior Court, Sitting in Bridgeport, Fairfield County, May 31, 1899.

Notice of Appeal.

In the above-entitled matter, the defendants or respondents, said Wheeler & Howes, hereby give notice that they appeal to the supreme court of errors from the decision, judgment, decree and action of said the Hon. Ralph Wheeler, a judge of the superior court, in appointing appraisers upon said application.

DEFENDANTS OR RESPONDENTS,
By DE FOREST & KLEIN AND
PAIGE & CARROLL, *Their Attorneys.*

(Filed May 31, 1899.
R. WHEELER, *J.*)

(Filed May 31, 1899.
WM. R. SHELTON, *Clerk.*)

18 * * * * * * * *

THE NEW YORK, NEW HAVEN & Hartford Railroad Company. *vs.* WHEELER & HOWES.	Before Ralph Wheeler, a Judge of the Superior Court, Bridgeport, Sept. 18th, 1899.

Finding.

1. Upon the trial of the above-entitled cause, the only issues of fact that were joined and tried are those raised by the allegations of the amended application and by the respondents' first defense in their answer to the amended application as on file.

2. All the allegations of the application are found true.

3. Said special act was passed with the assent of the city attorney of said city, acting under the vote of the common council of
19 said city, contained among the votes and minutes of that body hereinafter referred to.

4. Said city had, at all times subsequent to the execution of said agreement, full knowledge of that fact and of the provisions of said agreement.

5. Said city has at no time and in no way expressed any disapproval of or dissent to the execution of said agreement, or any of its provisions.

6. Said city expressed no opposition to the approval of said agreement by the railroad commissioners, at a public hearing called and held in said city for that purpose by said commissioners on Jan. 15th, 1896.

7. After the execution of said agreement, the New York, New Haven & Hartford Railroad Company expended many thousands of dollars in acquiring lands and in proceedings under the terms of said agreement.

8. No city meeting of the city of Bridgeport ever passed any vote or resolution authorizing, ratifying or confirming said agreement, or authorizing the bringing of the application referred to in paragraph 2 of the application.

9. Before the execution of said agreement, the applicant had acquired and paid for at a very considerable expense, land for the purpose of constructing thereon a four track railroad through the city of Bridgeport upon the proposed route indicated on said plans.

10. The respondents objected to evidence offered by the applicant as regards its purchase of land subsequent to the execution of the agreement, said evidence being offered as relevant upon the question of assent to and ratification of said agreement by said city. I admitted the evidence and the respondents excepted.

11. From the action of the common council of said city, as disclosed by the minutes of the various meetings of that body in the premises, all which are by reference made a part of this finding, and from the failure of the city in any way to express any disapproval of the execution of said agreement or of any of its terms, I find and hold that said city assented to and ratified said agreement.

12. All the minutes and records of the actions of the common council of the city of Bridgeport, referred to in paragraphs
20 Nos. 3, 4, 5 and 6 of the finding, when offered in evidence by the plaintiff, were objected to as being irrelevant and inadmissible as showing any action by the city of Bridgeport approving, ratifying, consenting to or acquiescing in said special act of the legislature or any proceedings thereunder. But the court overruled said objection and admitted said evidence for said purpose.

13. The respondents claimed, as matters of law, that the applicants had no right to condemn or take the land in question in the manner proposed by this application, and that said application should be dismissed, because:

1. If the land of the defendants should be taken and condemned

and if the project of the applicant should be carried out as called for by said agreement and plans as proposed by the applicant, the taking and condemnation of the defendants' said property will be for purposes not authorized by the special act for the abolition of grade crossings in Bridgeport, approved June 22, 1895, and hence will be illegal and void, and said taking and condemnation will be contrary to the provisions of the 25th amendment to the constitution of this State and of sec. 1 of article 14 of the amendments to the Constitution of the United States.

2. Said special act, upon which this application is based, is unconstitutional and void, as being in violation of the 25th amendment to the constitution of this State and of sec. 1 of article 14 of the amendments to the Constitution of the United States.

3. Said pretended agreement between the city of Bridgeport and the applicant company was never executed by the city of Bridgeport within the meaning of said special act.

4. Said pretended agreement is not in accordance with or within the scope of or in any manner authorized by said special act.

5. Said pretended agreement was never presented to said railroad commissioners by the city of Bridgeport, and was never properly before said commissioners under and in accordance with the provisions of said special act.

6. Said railroad commissioners had no jurisdiction or authority of any kind to act in the premises.

7. But I overruled these claims and appointed appraisers named.

RALPH WHEELER,
Judge of the Superior Court.

(Filed Sept. 19, 1899.
WM. R. SHELTON, *Clerk.*)

(Refiled Oct. 4, 1899.
WM. R SHELTON, *Clerk.*)

21 *Extracts from the Records of the Common Council of the City of Bridgeport.*

Common council meeting of Nov. 21, 1894, city clerk's records, vol. 9, p. 110.

"Petition of John McNeil, president of the board of trade, *et al.*, for the appointment of a committee to consider the elimination of grade crossings by the railroad Co."

Common council meeting of Dec. 5, 1894, city clerk's records, vol. 9, p. 132.

"Whereas, the numerous fatal accidents occurring at the railroad crossings of Sterling, Harriet and Noble streets, where there are no gates, and at Kossuth street when the gatekeeper is off duty, where within the last few weeks a mother and father and two young men have been killed, and whereas, we understand that the railroad company has refused to place gates at the above-named

places, because they say they have perfected plans to abolish all grade crossings in Bridgeport—

Resolved, That his honor, the mayor, be requested to communicate with the officials of the N. Y., N. H. & H. R. R. Co., stating that the city is still ready to co-operate with the company in eliminating all grade crossings in Bridgeport, upon a fair, just and equitable basis, and if the company desires to show their plans and confer with the city upon this subject, the council will appoint a committee, consisting of the mayor, one alderman, one councilman and four citizens, which committee shall have power to inquire into and consider in behalf of the city, all matters pertaining to the abolition of grade crossings and change of grade by the N. Y., N. H. & H. R. R. Co. system within the limits of said city, that this whole matter may be speedily arranged and the grade crossings eliminated."

(Adopted.)

Common council meeting of Dec. 12, 1894, city clerk's records, vol. 9, p. 135.

"The following communication was received from his honor, the mayor:

"'GENTLEMEN: I deem it my duty at this time to call your attention to the following portion of my opening message to you at the first meeting of this fiscal year relative to the elimination of grade crossings in this city.

WALTER B. BOSTWICK, *Mayor*.'"

22 "The consolidated road in the city.—The matter of the relations existing between this city and the consolidated railroad company, will require much attention at your hands. In the near future, and probably before the close of my official term, the problem of the elimination of grade crossings in this city must be solved. It goes without saying that in the solution of that matter most important interests of the city, of the railroad company and of individual property-owners for a long time to come are involved. When we consider that the tracks of the company traverse the city from north to south and from east to west, from boundary to boundary, and the number of grade crossings and the importance of most of the streets crossed, and the effect directly and indirectly upon the property-owners and the general public of closing any street or changing its grade, and the expenses involved in the whole undertaking, we must acknowledge that it is the most important problem that has ever confronted this municipality. It is my desire that the city's rights shall be maintained, and that the rights of the property-owners shall be secured in the settlement of the matter. To this end our joint labors must be directed. But we should not approach the matter from the standpoint of prejudice or of hostility to the rights of the railroad company. Before the matter is finally adjusted the city will have many favors to ask of the railroad company, and the railroad company will have many favors to ask of

the city, and the parties should meet in the spirit of accommodation, and the question should be handled without needless irritation between them, and with firmness and moderation on the part of the city. I trust that you will deal with the matter in this way."

(Accepted.)

Common council meeting of Jan. 9, 1895, City Clerk's Records, vol. 9, p. 161.

"The city attorney reported as follows:

"'To the common council:

In view of the impending controversy before the General Assembly, between the city and the consolidated railroad company, over the matter of the removal of grade crossings in this city, and the possibility that objection might be made to the right or authority of the city attorney to appear in behalf of, and to represent the city in hearings before the committee of said assembly under the existing ordinances, I would recommend that your honorable body at once pass the accompanying resolution.

Dated at Bridgeport this 7th day of January, 1895.

DANIEL DAVENPORT,
City Attorney.'

23 "'Resolved, That the city attorney be, and he is hereby fully authorized and directed to appear in behalf of the city before the railroad committee or other committee of the General Assembly, in any controversy or negotiations growing out of the matter of the removal of the grade crossings in this city; and that he be directed to advise and consult with the senator and representatives from Bridgeport as to the existing provisions of the law, and as to any proposed legislation on that subject, and to draft any bill or amendment required to protect the rights and interests of this city and its tax-payers in relation thereto.'"

(Adopted.)

City Clerk's Records, vol. 9, p. 586.

Copy of Agreement Between the City of Bridgeport and the N. Y., N. H. & H. R. R. Co.

(The agreement is not printed here, inasmuch as it is made a part of the applicant's application.) See Exhibit A, p. 3.

Common council meeting of April 20, 1896, City Clerk's Records, vol. 11, pages 19, 20.

"To the honorable common council of the city of Bridgeport.

GENTLEMEN: Under the provisions of a resolution of the General Assembly of the State of Connecticut, providing for the abolition of grade crossings in Bridgeport, approved June 22, 1895, Frank E. Clark, William E. Seeley and Frederick S. Stevens were appointed agents on behalf of the city of Bridgeport to enter into an agree-

ment with the New York, New Haven and Hartford Railroad Company, and we respectfully report that on the 21st day of December, 1895, we executed, on behalf of the city of Bridgeport, an agreement with the New York, New Haven and Hartford Railroad Company in relation to the matters mentioned in said resolution of the General Assembly, a copy of which agreement is herewith submitted.

(Signed) FRANK E. CLARK.
WILLIAM E. SEELEY.
FREDERICK S. STEVENS."

Common council meeting of May 4, 1896, City Clerk's Records, vol. 11, pages 50, 51.

"The city attorney reported as follows:

"'To the common council of the city of Bridgeport.

GENTLEMEN: Inasmuch as several of the members of your honorable body have this day called on me in reference to the injunction suit which was recently brought against the various members of your honorable body, and his honor the mayor, restraining you from taking any action on the railroad agreement, I deemed
24 it advisable to ask your honorable body for instructions before proceeding to lay out any line of action in reference to this suit. It is unnecessary for me to relate to you the history of the various negotiations between the city and the railroad company, and which culminated in the so called agreement made between the city, acting through F. E. Clark, F. S. Stevens and W. E. Seeley, who were appointed by the legislature, and the railroad company. This injunction purports to restrain your honorable body from fulfilling the terms of the agreement on behalf of the city because such an agreement is unconstitutional and illegal. In view of the fact that your honorable body has not yet taken any action on the report of the above-named committee, I felt that it might be presumptuous on my part to have anticipated that you would have accepted their report and ratified the agreement, and I therefore await your action. If you would not have ratified this agreement, but, on the other hand, would have rejected and repudiated it, of course we should construe such action to mean that you would be willing to have the injunction stand. While this injunction is pending, your honorable body cannot take any action on the report, but you can instruct me whether you desire to have the injunction stand, or an effort made to have it dissolved. I have also been informed that the railroad company have made a demand upon the city treasurer for $6,800 as the city's share of the cost of the work so far performed under the agreement, consequently there is but little doubt that the matter will reach the courts of adjudication soon. I would recommend the passage of the accompanying resolution.

Yours very respectfully, J. D. TOOMEY,
City Attorney.'

"'Resolved, That the city attorney be, and he is hereby instructed to take such legal steps in reference to any suits brought either to

restrain or enforce an agreement between the New York, New Haven & Hartford Railroad Company and the city of Bridgeport, as will protect the interests of said city, and dissolve the injunction brought by Frank J. Mooney against the mayor and aldermen of the city of Bridgeport; and he is hereby authorized and empowered to employ such assistance in said suits as to him may seem necessary.'"

(Referred to the committee on miscellaneous matters.)

Common council meeting of May 4, 1896, City Clerk's Records, vol. 11, p. 52.

"Resolved, That the city attorney is hereby requested to render an opinion to the miscellaneous committee in behalf of this council what action, if any, may be lawfully taken by this council in the payment of money demands made upon the city by the N. Y., N. H. & H. R. R. Co., relative to the elimination of grade crossings within the city limits."

(Referred to the miscellaneous committee.)

Common council meeting of May 18, 1896, city clerk's records, vol. 11, pages 57, 58.

"The following petition was received from F. Luzon and referred to the committee on miscellaneous matters:

'To the honorable common council of the city of Bridgeport.

GENTLEMEN: Whereas, a serious question having arisen as to the constitutionality of a special act of the legislature of the State of Connecticut, whereby the city of Bridgeport, under and in accordance with its provisions, has entered into an agreement or compact with the N. Y., N. H. & H. R. R. Co. to pay a sum of money equal to a one-sixth part of the expense necessary to the elimination of grade crossings within the corporate limits of said Bridgeport; and whereas, the city of Bridgeport having been legally enjoined by one of its citizens and tax-payers, Frank J. Mooney, Esq., from consummating or carrying out any and all of the provisions of the agreement or compact as aforesaid; and whereas, in consideration of the vast amount of debt and onerous rate of taxation that must necessarily be entailed upon the tax-payers of Bridgeport for many years to come as a result of the consummation of said compact or agreement; be it and it is hereby resolved, that a committee of three aldermen to consist of Messrs. N. J. Phelan, Sidney W. Challenger and David J. O'Rourke, be appointed to confer with the N. Y., N. H. & H. R. R. Co. for the purpose of securing a remission or annulment of all agreements or compacts at present existing between the New York, New Haven & Hartford Railroad Company and the city of Bridgeport in relation to the elimination of grade crossings as aforesaid, and also that the railroad company be requested to proceed at once in the prosecution of the work in hand under the direction of the honorable board of railroad commissioners, and in accordance with the statute law appertaining thereto.'"

(Referred to the committee on miscellaneous matters.)

Common council meeting of May 18, 1896, city clerk's records, vol. 11, p. 69.

"The committee on miscellaneous matters respectfully beg leave to report that the communication from the city attorney in reference to the injunction proceedings brought against the
26 mayor and aldermen of the city of Bridgeport be accepted, and your committee recommend the adoption of the following resolution as a substitute for the resolution accompanying said communication. Resolved, that the city attorney be and he is hereby authorized to take such action as will secure the dissolution of the injunction brought by Frank J. Mooney against the mayor and aldermen of the city of Bridgeport, and he is hereby authorized and empowered to employ such assistance in said suit as he may deem necessary."

"To the honorable common council of the city of Bridgeport:

The undersigned, a minority of the committee on miscellaneous matters to which was referred a communication of the city attorney with accompanying resolution relating to the employing of counsel to assist him in moving to dissolve the injunction now in force against this board, would most respectfully beg leave to report that they have carefully examined the same and believe that it is not for the best interests of the city that any action should be taken in the direction indicated. In arriving at this conclusion the undersigned have been governed by two important considerations. In the first place, there is a question in our minds whether the members of the board of alderman have the right to employ counsel at the city's expense to take action in a legal controversy which is directed against the mayor and each individual alderman. It is the opinion of a large number of our citizens that the mayor, or any of the aldermen, can only employ counsel for the purpose of moving to dissolve this injunction at their own expense. If this opinion is worth anything, then any attempt to fasten upon the city any such expense would not only be illegal, but contrary to that duty which we, as the chosen representatives of the people, have sworn to perform. In the second place, we are strongly convinced that any action on the part of this common council which could in any way be interpreted as approving of the so-called agreement made by Frank E. Clark, William E. Seeley, and Frederick S. Stevens, as a committee appointed by act of the General Assembly, with the N. Y., N. H. & H. R. R. Co., for the purpose of building a four-track road through this city, and incidentally to abolish grade crossings, would not only be unwise at this time, but contrary to the business principles, which, as careful custodians of the rights of the tax-payers, we should ever seek to introduce into the management of municipal matters. The injunction, which this resolution introduced by the city attorney at the request of certain members of this body proposes to move to dissolve, is brought in the interest of the city, and it will be fought to the courts of last
27 resort without costing the tax-payers a single cent. If the principle which is represented in this injunction is sustained

the burden which it is proposed to fasten upon the tax-payers, and which will fall with crushing force on the smaller ones, who are least able to bear it, will be dispelled. It would seem under such conditions the part of wisdom for this common council to take no affirmative action whatsoever in the matter until the courts have passed upon the legality of the so-called act of agreement. The undersigned would, therefore, recommend the adoption of the following resolution: Resolved that the consideration of the whole matter be indefinitely postponed."

(Minority report of the committee on miscellaneous matters)

"Alderman Holzer moved the adoption of the majority report. Alderman Phelan moved as an amendment that the minority report of the committee be substituted for the majority report. Alderman Challenger requested that the vote when taken be by yeas and nays. The following is the vote as taken to substitute the minority report for the majority. Yeas: Aldermen Thompson, Phelan, O'Rourke, Hincks, Northrop, Ruggles, Challenger and Burritt, 8. Nays: Aldermen Lasher, Lyons, Clampett, Seeley, Curtis, Windsor, Downer, Adams, Baker, Holzer and Grippin, 11. Absent: Alderman Thomas. Motion declared lost. Alderman Phelan then moved that the majority report as read be laid upon the table. Motion lost. The majority report was then adopted by the following vote, Alderman Phelan first voting in the negative and then requesting, before the result of the ballot was declared, that he be permitted to change his vote to the affirmative for the purpose of reconsideration at the next meeting. Yeas: Alderman Lashar, Phelan, Lyons, Clampitt, Seeley, Curtis, Windsor, Downer, Adams, Baker, Holzer and Grippin, 12. Nays: Aldermen Thompson, Hincks, O'Rourke, Northrop, Ruggles, Challenger and Burritt, 7. Absent: Alderman Thomas."

Common council meeting of May 18, 1896, city clerk's records, vol. 11, pages —.

"The following communication was received from H. G. Schofield and referred to the committee on miscellaneous matters:

"To the honorable board of aldermen of the city of Bridgeport:

Much has been said and a great variety of opinion expressed in relation to the question of the abolition of grade crossings in
28 this city, more particularly in regard to the methods and to the cost to the city under the agreement made by the committee named in the legislative act, and the New York, New Haven & Hartford Railroad Co. It is safe to assume that the general public as well as the officials of the railroad company, desires the elimination of crossings at grade, and that this matter cannot be long delayed. It is well known that the company presented and persistently urged a plan which would have met all the requirements equally well and at a cost vastly less; but their plan not only involved, but made absolutely necessary, the closing of several of our most important thoroughfares. It will be readily seen that in a

substantially level city when the crossings are near together, that whatever plan of crossing be adopted at one street, whether over or under, the same plan must be applied to the next, and so on, as it would require the length of several blocks to make possible the change from an over to an under grade crossing, and all intermediate streets must of necessity be closed. The company proposed a depressed grade from Fairfield avenue easterly to Park avenue, passing under that avenue as at present, except they wished to raise this bridge 6 feet. From this point easterly they proposed by the use of a heavy grade to be sufficiently high at Lafayette street to provide for an under-grade crossing of the highway. Beginning at the West End their plan would close Hancock avenue, or result in enormous damage to the organ factory and to the steel works opposite, by reason of a fill extending back several hundred feet between these buildings, made necessary as an approach to the highway bridge. The same difficulty would exist at South avenue, only in a more aggravated form, doing an almost irreparable injury to the property of the Malleable Iron Co., saying nothing *to* the inconvenience to the general public caused by the circuitous ways and steep grades of getting onto *to* the bridges at the few remaining crossings. Then crossing to the east of Park Ave., it is evident that Myrtle Ave. and Warren St., two very important thoroughfares, must of necessity be closed. Now this is the plan which the company still desires and in the case of the failure of this agreement, it is the plan with which the company will go before the railroad commissioners, or to the next legislature, for approval, and do we wish to risk the result? There seems to be an impression abroad that under this agreement we are called upon to contribute to the betterment of the road. This is a mistake. Their plan furnishes all the facilities they desire for the proper performance of their business, and at the same time does away with the crossings at grade. The amount named in the agreement to be paid by
29 the city is not for the benefit of this company, but is in part payment of the additional expense forced upon the company by the requirements and demands made by the committee, and, as many believe, in the interest of the city.

These requirements are the maintenance of all existing highways, the construction and maintenance of sidings at the West End for the accommodation of present and prospective interests in that locality, the construction of a siding and maintenance of the same in East Bridgeport; thus continuing the facilities for business so long enjoyed, the latter point being a special concession on the part of the company, they believing that East Bridgeport would be reasonably accommodated by their proposed freight yard located east of Chapel street. These changes from the original plan provided for in this agreement will cost the company a sum largely in excess of the amount of the city's share of the expense. The increased cost in one section alone, that lying between Park avenue and Fairfield avenue, will exceed $250,000. To properly weigh the advantages gained to the city by this agreement we should look beyond the injury and inconvenience of the present,

and consider its bearing upon our future growth and prosperity, remembering that this change is for all time. Much stress is laid by the opponents of this agreement upon the fact that it provides for the payment by the city of one sixth part of the cost of land taken or required to carry this plan into effect. Now the amount to be paid by the city cannot exceed the fixed and definite sum named in the agreement, and it makes little difference whether it be applied to the payment for land taken or to construction account, or for any other purposes whatsoever; the only question being whether in paying this amount we receive an equivalent in the way of advantages over and above what we would reasonably expect to obtain at the hands of the railroad commissioners under the general law, or from the next legislature, for the grade crossing must go. We have now before us a definite plan for the work, and a fixed time in which it is to be completed. We have been for a long time swamped in uncertainty as to future movements; business interests have suffered and must continue to suffer with the prolongation of this uncertainty. One of the speakers at the miscellaneous committee last Thursday evening, referring to the proposition, to authorize the city attorney to take steps for the dissolution of the injunction, characterized such proceedings as anomalous on the ground that such action was against the interests of the city. Now there are many who believe that the best interests of the city require the removal of the injunction, and if the city attorny can aid to this result, he should not lack the authority.

H. G. SCOFIELD."

Common council meeting of May 29, 1896, city clerk's records, vol. 11, p. 84.

"At this time, Alderman Phelan, in accordance with notice given at last meeting, moved a reconsideration of the vote adopting the majority report of the committee on miscellaneous matters relative to taking steps for the dissolution of the injunction against the mayor and aldermen in relation to abolition of grade crossings. After a lengthy explanation of his position he withdrew his motion."

Common council meeting of June 1, 1896, city clerk's records, vol. 11, p. 90.

Message of Mayor Clark.

"The railroad question has progressed one stage during the year. The special committee appointed by the General Assembly to make an agreement for and in behalf of the city with the railroad company, has performed its work. The agreement provides for an elimination of grade crossings by an elevated structure through the city, an elevated station and a drawbridge, the city to pay to the company one-sixth of the cost exclusive of the station, the total cost to the city not to exceed $400,000 in any event. Recognizing

the fact that Bridgeport is a manufacturing city, the agreement provides for sidings for the proper accommodation of our manufacturers. However the matter may be looked at from the various standpoints from which it may be viewed or considered, it is my candid opinion and belief that the terms of the agreement are the best that the committee could secure, and are, all things considered, not unfair to the city. The additional expense of $100,000 to the city is, in my judgment, more than offset by the substitution of an elevated for a depressed structure as planned by the company, and the special freight facilities afforded to our manufacturers. So far as I can gauge public sentiment, it strongly favors the consummation of the agreement entered into between the railroad company and the committee. I have no hesitation in saying that I would regard it as a public misfortune to block the completion of the project by legal proceedings now when the work has been fairly begun. I prefer the carrying out of the terms of the contract with its resulting expense to the city, to prolonged litigation with its attendant delays and uncertainty. Taken as a whole, and giving due weight to all argument advanced in opposition, I be-
31-45 lieve that our city's true interest will be subserved by the consummation of the agreement, settling now and forever the railroad problem."

(Accepted and ordered printed in the proceedings and year book.)

City Clerk's Records, vol. 10, p. 36.

Doings of the railroad commissioners of the State of Connecticut relative to an agreement between the city of Bridgeport and the N. Y., N. H. & H. R. R. Co.

(This report is not printed, inasmuch as it appears in the *appears in the* applicant's application as Exhibits A and B.)

The foregoing evidence is the votes and resolutions and minutes of the common council of the city of Bridgeport, read on the trial of said cause, and comprises all such votes, minutes and resolutions so read.

Oct. 20, 1899.

R. WHEELER, *Judge.*

(Filed Oct. 20, 1899.

WM. R. SHELTON, *Clerk.*)

* * * * * * *

46

N. Y., N. H. & H. R. R. Co. vs. Wheeler & Howes. } Before the Hon. Ralph Wheeler, a Judge of the Superior Court, Sitting at Bridgeport, in Fairfield County, October 11, 1899.

Defendants' Appeal.

In the above-entitled cause the defendants appeal from the judgment and decision of said judge, to the supreme court of errors, at its session to be held at Bridgeport, in Fairfield county, in and for the third judicial district, on the fourth Tuesday of October, 1899, for the revision of the errors which they claim to have occurred in the trial thereof, and for reasons of said appeal assign the following, in relation to which they claim that said judge erred and mistook the law:

I.

Errors Apparent on the Face of the Trial Record.

1. In overruling the defendants' demurrer to the plaintiff's amended application, said amendment being the additions of and annexing to the application of Exhibits A and B.

2. In granting the plaintiff's motion to strike out the second defense in the answer to said amended application.

II.

Errors in the Conduct of the Trial to the Judge.

1. In admitting the evidence offered by the plaintiff as regards its purchase of land subsequent to the execution of the agreement referred to in the application, as stated in the finding in par. 10 thereof.

2. In admitting the minutes and records of the action of the common council, as stated in pars. 3, 4, 5 and 6 of the finding, notwithstanding the defendants' objections thereto, as stated in the finding, in par. 12 thereof.

3. In overruling the defendants' claims of law that, upon the facts appearing in evidence, the applicant had no right to condemn the land in question in the manner proposed by said application, and that said application should be dismissed, as stated in par. 13 of the finding.

4. In overruling the defendants' first claim of law, as stated in par. 13 of said finding.

47 5. In overruling their second claim of law as so stated.

6. In overruling their third claim of law as so stated

7. In overruling their fourth claim of law as so stated.

8. In overruling their fifth claim of law as so stated.

9. In overruling their sixth claim of law as so stated.

10. The defendants further claim that the finding should be corrected in accordance with exceptions 1, 2, and 3 respectively.

They therefore pray for such relief as is provided by law in the premises.

Bridgeport, October 11, 1899.

JOHN M. WHEELER AND
WILLIAM T. HOWES,
Defendants,
By DE FOREST & KLEIN AND
PAIGE & CARROLL,
Their Attorneys.

I certify the foregoing appeal was filed on the 11th day of October, 1899, and George P. Carroll, of Bridgeport, is recognized in the sum of fifty dollars, conditioned that said Wheeler & Howes, defendants, shall prosecute said appeal to effect, and pay all costs therein if they shall fail so to do; and said appeal is hereby allowed.

RALPH WHEELER,
Judge of Superior Court.

(Filed Oct. 13, 1898.

WM. R. SHELTON, *Clerk.*)

Superior Court, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said superior court.

Attest: WM. R. SHELTON, *Clerk.*

Supreme Court of Errors, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court of errors.

Attest: WM. R. SHELTON, *Clerk.*

48 At a Supreme Court of Errors in the Third Judicial District, Holden at Bridgeport on the Fourth Tuesday of October, 1899.

In the Matter of the Application of the New York, New Haven and Hartford Railroad Company *vs.* JOHN M. WHEELER and WILLIAM T. HOWES, Both of Bridgeport, Conn.	No. 9. On Appeal from the Hon. Ralph Wheeler, a Judge of the Superior Court, January 2, 1900.

This appeal by the defendants, claiming error in the process, record, and judgment and in the proceedings and decisions of the Hon. Ralph Wheeler, a judge of the superior court, on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this court, was allowed by the Hon. Ralph Wheeler and by the superior court for Fairfield county on the 11th day of October, 1899, and came to this court at its ses-

sion at Bridgeport on the fourth Tuesday of October, 1899, and thence by continuance to the present time, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment, and proceedings there is no error.

49 It is therefore considered and adjudged that there is no error, and that the appellee recover of the appellant- $— costs.

By the court:

WM. R. SHELTON, *Clerk.*

50 [Endorsed:] No. 9. In the matter of the application of the New York, New Haven and Hartford Railroad Company *vs.* John M. Wheeler and William T. Howes, both of Bridgeport, Conn. Supreme court of errors, third judicial district, Fairfield county, October term, 1899. Judgment.

51 Supreme Court of Errors, Third Judicial District, Bridgeport, October Term, 1899.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
v.
JOHN M. WHEELER ET AL.

Argued Nov. 2d, 1899; decided Jan. 2d, 1900.

HALL, *J.*:

This is an application by the New York, New Haven and Hartford Railroad Company to a judge of the superior court, under section 3464 of the General Statutes, for the appointment of appraisers to estimate the damages from the taking of certain real estate belonging to the defendants.

By the terms of the statute any railroad company is entitled to have such appraisers appointed upon proof that it has the right to take the land in question for railroad purposes, and that it cannot obtain it by agreement with the parties interested therein.

The defendants object to the appointment of appraisers upon the grounds that the plaintiff has no right to take this property, and that it is not unable to obtain it by agreement with the owners.

The reasons of the defendants' claim that the railroad company has no right to take the land in question are fully set forth in the demurrer to the application and in the claims made by the defendants upon the trial of the issue raised by the first defense.

Stated generally, their claim upon this point is that no
52 valid order for the performance of the work in question has been made:

First. Because the agreement entered into under section 2 of the special act of 1895 (Special Laws of 1895, p. 416) made a part of the plaintiff's application, and which provides for the construction of a four-track railroad over the defendant's land, according to plans made a part thereof, and for the apportionment of the expense between the city of Bridgeport and the railroad company, as

therein stated, was neither executed nor ratified by the city of Bridgeport nor presented by the city to the railroad commissioners for approval as intended by the act.

Second. If the agreement was executed in the manner contemplated by the act, because the provision in said agreement or order apportioning the cost of the work between the railroad company and the city, and imposing upon the latter the burden of paying a one-sixth part, not exceeding $400,000 of the entire cost of constructing a four-track elevated railroad through the city of Bridgeport, in place of the existing double-track road, is in contravention of the 25th amendment of the State constitution and of section 1 of the 14th amendment of the Constitution of the United States, and that therefore said agreement and order and the special act under which they were made are void and confer no authority upon the railroad company to perform the work in question or to take the defendants' property by this proceeding.

53 Regarding the first reason of the defendants' claim, we are of opinion that the failure of the city of Bridgeport to take any action, either by resolution of its common council or by vote of its citizens, to authorize the execution of the agreement, Exhibit A, or to ratify it after its execution by the railroad company and by the individuals named in section 2 of the act of 1895, or to request its approval by the board of railroad commissioners, furnishes no reason why the railroad company may not and should not proceed with the work of constructing the four-track railroad through the city of Bridgeport in accordance with the plans embraced in the agreement and of removing the dangerous grade crossings, as ordered by the railroad commissioners, nor why the railroad company may not, upon payment of just compensation, take the defendants' land for that purpose.

Section 2 of the act appoints three persons to act for the city for the purpose of making said agreement. It does not provide that it shall be executed or approved by any other persons or body acting in behalf of the city, nor that the city must join with the railroad company in requesting its approval by the railroad commissioners. We do not think the act contemplated that the city should appoint agents to execute the agreement, or that after its execution it should be ratified or approved by the common council of Bridgeport before it could become effective as a part of the commissioners'

54 order, or that the city should request its approval by the commissioners before the latter could approve it.

Neither the right of the railroad company to construct a four-track road in accordance with the proposed plans nor the power of the legislature or of its agents, the railroad commissioners, to order the removal of the grade crossings in that manner depends upon the consent of the city.

By the special act of 1895 the legislature expressly commanded that all crossings at grade over the main tracks of the New York, New Haven and Hartford Railroad Company in the city of Bridgeport should be abolished. To carry out that purpose, and at the same time to enable the railroad company to complete its four-track sys-

tem between New York and New Haven by constructing two additional main tracks through Bridgeport, so that they should not cross any highway at grade, it empowered the railroad commissioners to determine and direct by what plans and methods these objects should be accomplished, and also to apportion the expense.

For the purpose of facilitating the performance by the railroad commissioners of the duty thus imposed, it empowered them, in ordering the performance of this work, to approve and adopt such plan of construction, as well as such apportionment of the expense of the removal of the grade crossings by that plan, as might be agreed upon within six months by the railroad company and the mayor and two other citizens of Bridgeport appointed to act for the city.

55 Section 4 directed the commissioners to determine themselves the plans and methods of performing this work in case the agreement provided for in section 2 should not have been made. If the act intended that the agreement described in section 2 should either be executed by agents appointed by the city, or in some manner adopted or ratified by the city, after its execution by the three persons named by the legislature, then the agreement provided for by the act not having been made, the commissioners were fully authorized by section 4 to adopt as their own the plans of construction described in the so called agreement, and upon the application of the railroad company as made in December, 1895, and after the public hearing had in January, 1896, to order the work executed according to those plans, and this they expressly did by their order made January 23d, 1896, more than six months after the passage of the special act.

But, as before suggested, we think that the agreement entered into by the railroad company and the three persons who acted in behalf of the city was executed as the act intended. It has been duly approved by the commissioners and has thereby, by the terms of the second section of the act, become an order of the railroad commissioners issued by authority of the State, and obedience to which may be compelled by mandamus. Mooney *v.* Clark, 69 Conn., 241, 254; Wheeler *et al. v.* New York, N. H. & H. R. Co., 71 Conn., 270, 279. That the legislature has the power

56 through the railroad commissioners to compel the removal of these grade crossings in this manner, and the payment of the expense of such removal, either by the railroad company or the city, or by both, cannot be questioned. Woodruff *v.* Catlin, 54 Conn., 277, 295; New York & N. E. R. Co. *v.* Bristol, 151 U. S., 556; Mooney *v.* Clark, *supra.*

The order of the railroad commissioners having been thus made, section 8 of the act empowers the plaintiff to take any land which it "shall deem necessary properly to carry out said work in any and all particulars * * * in the same manner as is now provided by statute for taking land for railroad purposes." The railroad company, proceeding in the manner required by section 3464 of the General Statutes, voted to take the defendants' land for the purpose of changing the radius of its curves and for additional

tracks, as stated in the resolution of its board of directors, and such taking was duly approved by the action of the railroad commissioners taken June 30th, 1897. The act of 1895 therefore gives to the plaintiff company the right, upon the payment of due compensation, to take the defendants' land for the railroad purposes described in said resolution, unless the provisions of section 8 are rendered ineffective because some other parts of the act or of the agreement or order made in pursuance of it conflict with the constitution of this State or of the United States, as claimed by the defendants.

57 The necessity and propriety of the taking this land by the plaintiff for railroad purposes is conclusively settled by the vote of the railroad company to take it, and the action of the railroad commissioners of June 30th, 1897, approving such taking. Cockeroft's Appeal, 60 Conn., 161.

The taking of land for the railroad purposes described in the vote of the board of directors of the company is a taking of land for a public use, and a law which makes the decision of the railroad company and of the commissioners final upon the question of the necessity and propriety of taking certain land for such railroad purposes is not for that reason unconstitutional. New York, N. H. & H. R. Co. *v.* Long, 69 Conn., 424, 435.

This is not a proceeding in which the owner of property sought to be condemned attempts to show that it was not in fact taken for a public use. That the land is to be used by the railroad company for the purposes named in the vote of its directors in the construction of a four-track railroad is not questioned. The contention of the defendants is that it is to be used either wholly or in part for railroad purposes, which are not germane to the work of removing grade crossings. Whether taken merely to enable the railroad company to straighten its lines and construct additional tracks or taken only for the purpose of constructing a railroad so as to avoid crossings, the taking is in either case for railroad purposes, and is a taking for a public use. New York, N. H. & H. R. Co. *v.* Long, *supra.*

58 Since the commissioners had authority, without the consent of the city, to order this work to be performed, according to the plans adopted, and have so directed it to be done, and since the necessity and propriety of taking the land in question for railroad purposes has been finally determined, can the defendants, by questioning in this proceeding the validity of the apportionment between the city and the railroad company of the expense of the removal of the grade crossings, prevent the plaintiff from constructing, in accordance with those plans, the four-track railroad through the city which its business requires, and from removing the grade crossings in the manner ordered?

Sections 2 and 12 of the special act provide that the railroad commissioners, either by approving the agreement made under section 2 as to the amount to be paid by the city or, in case no such agreement shall have been made, by fixing the amount themselves after the work shall have been performed, shall direct what proportion

of the entire expense of removing the grade crossings in the manner ordered shall be paid by the city of Bridgeport.

Pursuant to these provisions the commissioners, by approving the agreement, have ordered that the city shall pay a one-sixth part, not exceeding $400,000, of the entire expense of constructing the road in accordance with the plans.

59 The defendants contend that by this agreement and order and by the plans made a part thereof the city will not only be required to pay a part of the cost of elevating the existing double track above the highways, but also to contribute to the payment of the expense incurred by the railroad company in taking land and building a drawbridge and doing other acts for the purpose of constructing two additional elevated tracks not necessary to the work of eliminating grade crossings. It is argued that the act and the agreement and order imposing such an obligation upon the city violates that provision of the State constitution which forbids any municipality from making any donation to a railroad corporation, and of the Constitution of the United States, which forbids the State from depriving any person of property without due process of law; that therefore the order of the commissioners made under this act, permitting the railroad company to construct its four-track road and requiring it to proceed with the work of the removal of the grade crossings, is invalid, and that the railroad company cannot under this order or under this act condemn the defendants' land.

If the railroad company desires to take this property as one step in carrying out the proposed plan, the defendants cannot prevent it upon the ground that the company may not afterwards be able to obtain reimbursement from the city. The ability of the

60 defendants to obtain payment of their damages does not depend upon the right of the railroad company to collect a part of it from the city. Before taking the land, the company must compensate the defendants.

Even if this proceeding could be regarded as one in which the judgment appointing appraisers established to some extent the liability of the city to pay its proportionate part of the expense, as fixed by the agreement and order, and in which the city or its tax-payers might properly make the claim that the apportionment of the expense was unlawful, such a defense would not be open to these defendants upon the facts before us. By the pleadings the defendants are simply owners of the property sought to be taken. They have not alleged that they are tax payers, or that they have any right or authority to represent the city or its tax-payers in this proceeding, or that they will be injured in any respect from the payment by the city of its part of the expense of the work as fixed by the agreement and order.

But the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property does not depend upon the obligation of the city to pay a one-sixth

part of the expense of the whole, or of any portion of the work of this undertaking.

61 The two purposes of the act of 1895 were, first, the removal of all existing grade crossings in Bridgeport and the construction in the most feasible manner, after considering the interest of the public, the rights, responsibilities, and duties of the railroad company, and of the city, and the rights of other parties concerned, of a four-track railroad through the city in such a way as to avoid crossing any highway at grade; and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners nor the power of the commissioners to compel its performance depends upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made, as authorized by section 2, the commissioners, after the work shall have been completed, shall apportion the entire expense among the proper parties.

We may add that the right of the railroad company to condemn the defendants' property does not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897, both of which are alleged

62 in this application, the railroad company is entitled under section 3464 of the General Statutes to take the land for the uses named in the resolution.

Without intending to imply that the agreement and order fixing the proportionate part of the entire expense of this work to be paid by the city is of doubtful validity, we refrain from further discussion of the subject, as we think the question is one which cannot properly be raised in this proceeding.

The question of the inability of the plaintiff to obtain the land from the defendants by agreement was one of fact, upon which the interview described in paragraphs 17 and 18 of the defendants' proposed finding was relevant evidence. Even though by a correction of the finding it should be made to appear that that was all the evidence upon the subject, we could not review the conclusion of the judge upon that question.

The defendants are not entitled to the other corrections of the finding asked for, since the record before us contains all the facts necessary for the presentation of the questions of law raised at the trial.

As the plaintiff was entitled to have appraisers appointed without having shown that the agreement in question was executed or ratified by the city, neither the rulings of the judge admitting evidence to prove those facts nor his findings from such evidence worked any harm to the defendants.

63 There was no error in striking out the second defense. It was not a proper special defense, and there was no reasonable

ground for pleading it as such. It was merely a repetition of averments contained in the demurrer, and therefore, by the defendants' admission, was no more than a statement of facts appearing in the application, and of claims of law made in the demurrer. By the demurrer and by the first defense the defendants had the full benefit of all claims of law and fact made by the second defense.

There is no error.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES PH——MRS, *Reporter.*

64 STATE OF CONNECTICUT, } *County of Fairfield,* } *ss.:*

I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut within and for the third judicial district and keeper of the seal thereof, hereby certify that the above and foregoing, together with the copies of certain plans marked "N. Y., N. H. & H. R. R. Co. *vs.* Wheeler & Howes, Plaintiffs' Ex. B, Defendants' Ex. 102," and certified to by me as a part of the record in this case, is a true copy of the record and of all proceedings in the cause of The New York, New Haven and Hartford Railroad Company *vs.* John M. Wheeler and William T. Howes.

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said county and State, this 20th day of February, 1900.

WM. R. SHELTON, *Clerk.*

Endorsed on cover: File No., 17,648. Connecticut supreme court of errors. Term No., 534. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company. Filed February 21st, 1900.